Office-Supreme Court, U.S.
FILED
MAY 16 19[illegible]
ALEXANDER [illegible]

Nos. 82-585 & 82-586

In The

Supreme Court of the United States

October Term, 1982

ALOHA AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

HAWAIIAN AIRLINES, INC.,
Appellant,

vs.

DIRECTOR OF TAXATION, STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF OF APPELLEE, DIRECTOR OF TAXATION, STATE OF HAWAII

KEVIN T. WAKAYAMA
(Counsel of Record)
WILLIAM D. DEXTER
345 Queen St., No. 800
Honolulu, HI 96813
(808) 531-6277

Attorneys for Appellee, Director of Taxation, State of Hawaii

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Is the Hawaii Public Service Company Tax imposed by Hawaii Rev. Stat. 239-6, which is reasonably characterized as a property tax, invalid under the supremacy clause to the extent it is measured in part by gross income received by air carriers from the intrastate transportation of persons because 49 U. S. C. 1513 prohibits any state from directly or indirectly imposing a tax on persons or on the carriage of persons in air commerce?

TABLE OF CONTENTS

	Pages
Statement of the Case	1
A. Statement of Facts	1
B. History of Proceedings	2
Summary of Argument	7
Argument	10
I. Introductory Considerations	10
II. The Legislative History Of Section 1513 And ADAP Reveals That Congress Did Not Intend To Exempt The Airlines From The PSC Tax To The Extent Measured By Gross Receipts From Air Transportation Of Persons On Inter-Island Flights.	11
A. Introductory Considerations	11
B. An Examination Of The Legislative History Of 49 U. S. C. Section 1513 Demonstrates That Congress Intended To Preempt Specific User Taxes That It Had Previously Imposed To Fund Airport Development And Safety: This Type of Tax May Generally Be Characterized As A "Head Tax."	13
1. The Entire Legislative History Conclusively Demonstrates That Congress Did Not Intend To Invalidate A Tax Like The PSC Tax To The Extent It Is Measured By Gross Receipts:	14
a. The 1972 House Conference Report On S. 3755	14
b. The 1973 House Conference Report On S. 38	15
c. The 1972 House Report On H. R. 14847	15
d. The 1972 Senate Report On S. 3755	16
e. The 1973 House Report On H. R. 6388	16

TABLE OF CONTENTS

Pages

f. The 1973 Senate Report On S. 38 17

g. The 1972 And 1973 Congressional Record 21

h. The 1972 House Hearings 21

i. The 1972 Senate Hearings On S. 2397, S. 3302, S. 3611, And S. 3755 22

j. The 1973 House Hearings On H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, And S. 38 24

2. Legislative History Conclusion 24

III. As A Matter Of Statutory Interpretation, Section 1513 Does Not Prohibit Hawaii's PSC Tax As Applied To Airlines, Even Though The PSC Tax Is Measured By Gross Receipts From Air Transportation. 26

A. Introductory Considerations 26

B. Applicable Rules Of Construction 27

C. Constitutional Standards For Preemption 28

IV. The Plain Language Of Section 1513 Does Not Prohibit States From Levying General Business Taxes Or Property Taxes—Such As The Hawaii PSC Tax Or Other Taxes Permitted By Subsection (b) — Even Though The Taxes May Be Measured In Whole Or In Part By Gross Receipts From Air Transportation. 29

V. The Hawaiian PSC Tax Is Not Prohibited By 49 U. S. C. 1513 Because It Has Been Reasonably Classified As A Property Tax By The Hawaiian Legislature, Courts, And Tax Administrator 40

VI. Response To The Arguments Of The Airlines, The Solicitor General, And The ATA 45

Conclusion 50

TABLE OF AUTHORITIES

Pages

Cases:

Alabama v. King & Boozer, 314 U. S. 1 (1941) 39

Arizona Public Services Co. v. Snead, 441 U. S. 141 (1979) 48

Azure v. Morton, 514 F.2d 897 (9th Cir. 1975) 30

Buscaglia v. Bowie, 139 F.2d 294 (1st Cir. 1943) 30

Church of the Holy Trinity v. United States, 143 U. S. 457 (1892) 28

City of Detroit v. Murray Corp., 355 U. S. 489 (1958) 39

Cleveland Trust Co. v. Lander, 184 U. S. 111 (1902) 37

Cleveland v. United States, 329 U. S. 14 (1946) 34

Complete Auto Transit, Inc. v. Brady, 430 U. S. 274 (1977) 40

Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77 (1938) 40

Corn Products Refining Co. v. Commissioner, 350 U. S. 46 (1955) 27

Cudahy Packing Co. v. Minnesota, 246 U. S. 450 (1918) 38, 42

Educational Films Corp. v. Ward, 282 U. S. 379 (1931) 37

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U. S. 707 (1972) 5, 6, 15, 16, 19, 21, 45

Fargo v. Michigan, 121 U. S. 230 (1887) 38

FBI v. Abramson, — U. S. —, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982) 27

Federal Power Comm'n v. Union Electric Co., 381 U. S. 90 (1965) 31

Flint v. Stone Tracy Co., 220 U. S. 107 (1911) 37

TABLE OF AUTHORITIES

	Pages
Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957)	34
Ginsberg & Sons v. Popkin, 285 U.S. 204 (1932)	34
Great Northern Ry. Co. v. Minnesota, 278 U.S. 503 (1929)	38
Hamilton Co. v. Massachusetts, 73 U.S. (6 Wall.) 632 (1867)	37
Hawaii Consolidated Ry. Ltd. v. Borthwick, 34 Hawaii 269 (1937), *aff'd*, 105 F.2d 286 (1939)	3, 41
HC&D Moving & Storage Co. v. Yamane, 48 Hawaii 486 P. 2d 382 (1965)	41
Home Ins. Co. v. New York, 134 U.S. 594 (1890)	37
Illinois Central Railroad v. Minnesota, 309 U.S. 157 (1940)	41
James v. Dravo Contracting Co., 302 U.S. 134 (1937)	39
Jareki v. G.D. Searle & Co., 367 U.S. 303 (1961)	33
Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954)	39
Lyman v. Commissioner, 83 F.2d 811 (1st Cir. 1936)	34
MacEvoy Co. v. United States, 322 U.S. 102 (1944)	34
Mandel Bros. v. Federal Trade Comm'n, 254 F.2d 18 (7th Cir. 1958)	30
Maneja v. Walalua Agr. Co., 349 U.S. 254 (1955)	49
Markham v. Cabell, 326 U.S. 404 (1945)	27
Meyer v. Wells, Fargo & Co., 223 U.S. 298 (1912)	39, 40, 43
National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977)	40
Neal v. Clark, 95 U.S. 704 (1877)	33
NLRB v. Lion Oil Co., 352 U.S. 282 (1957)	27

TABLE OF AUTHORITIES

Pages

Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n, 390 U. S. 317 (1968) ____ 43

Norton Co. v. Department of Revenue, 340 U. S. 534 (1951) ____ 44

Pacific Co. v. Johnson, 285 U. S. 480 (1932) ____ 37

Philadelphia & Southern S.S. Co. v. Pennsylvania, 122 U. S. 326 (1887) ____ 38

Polish National Alliance v. NLRB, 322 U. S. 643 (1944) ____ 31

Pullman Co. v. Richardson, 261 U. S. 330 (1923) ____ 38, 39

Quindlen v. Prudential Ins. Co., 482 F.2d 876 (5th Cir. 1973) ____ 30

Railway Express Agency, Inc. v. Virginia, 347 U. S. 359 (1954) ____ 38, 41

Railway Express Agency, Inc. v. Virginia, 358 U. S. 434 (1959) ____ 38, 41

Rice v. Santa Fe Elevator Corp., 331 U. S. 218 (1947) ____ 29

Roland Electrical Co. v. Walling, 326 U. S. 657 (1946) 49

Schwartz v. Texas, 344 U. S. 199 (1952) ____ 29

Society for Savings v. Coite, 73 U. S. (6 Wall.) 594 (1867) ____ 37

United Airlines, Inc. v. Porterfield, 28 Ohio St. 2d 2d 97, 276 N.E. 2d 629 (1971) ____ 13

United States v. American Trucking Association, 310 U. S. 534 (1940) ____ 28

United States v. Brown, 333 U. S. 18 (1948) ____ 28

United States v. City of Detroit, 355 U. S. 466 (1958) 39

United States v. Henning, 344 U. S. 66 (1952) ____ 49

United States v. Monia, 317 U. S. 424 (1943) ____ 27

United States v. New Mexico, 455 U. S. 720 (1980) ____ 39

TABLE OF AUTHORITIES

Pages

United States v. Public Util. Comm'n., 345 U. S. 295 (1953) 28

United States Express Co. v. Minnesota, 223 U. S. 335 (1912) 38

Wedding v. Wingo, 483 F.2d 1131 (6th Cir. 1973) 34

Werner Machine Co. v. Director of Division of Taxation, 350 U. S. 492 (1956) 33, 37

Statutes:

Airport and Airway Development Act of 1970, 84 Stat. 219 3

Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88 *et seq.* 1, 5

Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236 1

I. R. C. Sections 4261 and 4271 ..... 7, 8, 29, 30, 36

Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 43

Hawaii Rev. Stat. 239-2 1

Hawaii Rev. Stat. 239-5 44

Hawaii Rev. Stat. 239-6 ..... *passim*

26 U. S. C. Sections 4261 and 4271 ..... 3, 4

49 U. S. C. 1301(10) 31

49 U. S. C. 1301(21) 31

49 U. S. C. 1513 ..... *passim*

TABLE OF AUTHORITIES

Pages

Miscellaneous:

73 Am. Jur. 2d *Statutes* (1974) 26, 27

Nutting, *The Ambiguity of Unambiguous Statutes*, 24 Minn. L. Rev. 509 (1939) 27

Texts:

1 T. Cooley, *The Law of Taxation* (4th ed. 1924) 32, 38

2A *Sutherland Statutory Construction* (C. Sands 4th ed. 1973) 28, 30, 33, 49

L. Tribe, *Constitutional Law* (1978) 38

Hawaiian Legislative History:

House Standing Comm. Rep. No. 792 (Finance Comm.) *reprinted in* 1963 House Journal 799 42

House Standing Comm. Rep. No. 850 (Ways and Means Comm.), *reprinted in* 1963 Senate Journal 950 42

Federal Legislative History:

Bills to Amend the Airport and Airway Development Act of 1970: Hearings on S. 2397, S. 3302, S. 3611, and S. 3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2d Sess. (Apr. 25 & 26, June 12, 1972) 22, 23

Bills Concerning State Taxation and the Federal Share of Funds to be used for Airport Construction, Maintenance, and Improvements: Hearings on H. R. 2337; H. R. 14847, and H. R. 10326 (and identical bills) Before the Subcomm. on Transportation and Aeronautics of the House

TABLE OF AUTHORITIES

Pages

Comm. on Interstate and Foreign Commerce; 92d Cong., 2d Sess. (June 19 & 23, 1972) 21

Bills to Amend the Airport and Airway Development Act of 1970: Hearings on H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. 98-99 (Mar. 14, 15, 20, 22 & 27, 1973) 8, 14, 24, 26, 35, 48-49

H. R. Conference Rep. No. 92-1543, 92d Cong., 2d Sess. (Oct. 5, 1972) 14, 15

H. R. Conference Rep. No. 93-225, 93rd Cong., 1st Sess. (May 24, 1973) 15

H. R. Rep. No. 92-1279, 92d Cong., 2d Sess. (Aug. 2, 1972) 15

H. R. Rep. No. 93-157, 93rd Cong., 1st Sess. (Apr. 19, 1973) 16, 17

S. Rep. No. 92-1005, 92d Cong., 2d Sess. (Aug. 1, 1972) 16

S. Rep. No. 93-12, 93rd Cong., 1st Sess. (Feb. 1, 1973), *reprinted in* [1973] U. S. CODE CONG. & AD. NEWS 1434 ..... 5, 6, 13, 17, 18, 19, 20, 21

STATEMENT OF THE CASE

This consolidated case arises out of the claims of Aloha Airlines, Inc., a Hawaiian corporation, and Hawaiian Airlines, Inc., a Hawaiian corporation (hereinafter referred to as the airlines). The airlines here argue that Hawaii Rev. Stat. 239-6 violates the federal constitution's supremacy clause because 49 U. S. C. 1513 proscribes the levy of *any* tax on airlines (including general business or property tax) to the extent the tax is measured by gross receipts that derive from air transportation of persons.

This consolidated case was submitted on Stipulations of Facts which, except for certain Exhibits, are set forth in the Joint Appendix (hereinafter cited as J.A.). The only facts in controversy that this Court must address are those "facts" to be gleaned from the legislative history relating to the purposes and policies behind the Congressional enactment of the two relevant federal laws. These two enactments, 49 U. S. C. 1513 as contained in the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88 *et seq.*, and the Airport and the Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236, are hereinafter referred to as ADAP — the federal Airport Development Aid Program.

A. Statement of Facts.

The pertinent facts are as follows:

(1) The airlines are domestic Hawaiian corporations with their principal places of business in Hawaii. All of their properties and employees are located in Hawaii except for those employees and properties associated with out-of-state ticket sales offices. (J.A. at 11, 12, 15, 30).

(2) The airlines are public service companies as defined in Hawaii Rev. Stat. 239-2. They are engaged in the

business of the transportation of persons and property by air between airports on various islands of the State of Hawaii (J.A. at 6, 15). Hawaiian Airlines, Inc. also provides technical services for charter and private aircraft in Hawaii (Hawaiian Record at 115 (k), Hawaiian Airlines Exhibit I, 1978 Annual Report, at 7).

(3) Hawaii Rev. Stat. 239-6 (hereinafter referred to as HRS 239-6 or the PSC Tax) is not measured by the airlines' gross income from transportation of passengers or freight between Hawaii and any other state or country, or between any two points outside the State of Hawaii. The measure of HRS 239-6 only includes gross income from inter-island transportation. (J.A. at 11, 28-9).

(4) Except for the PSC Tax, the airlines do not pay any tax to any state or foreign country upon their tangible and intangible personal property, including going concern values (J.A. at 12, 13, 32) or any tax measured by their gross income from inter-island air transportation of passengers or freight. (J.A. at 13, 32).

(5) Tickets to fly on the airlines' inter-island flights are sold in Hawaii by the airlines, and by other airlines and travel agents throughout the United States and foreign countries. (J.A. at 12, 28).

B. History of Proceedings.

Although Section 1513 was enacted as part of the Airport Development Acceleration Act of 1973, the airlines without question nevertheless voluntarily continued to pay the taxes prescribed by HRS 239-6 for several years after 1973. The airlines' current position, that HRS 239-6 is invalid as applied to the extent measured by gross receipts that derive from air transportation of persons, was first advanced in 1977 by Aloha Airlines and in 1978 by Hawaiian Airlines. The airlines do not con-

tend that any other gross income from their air transportation is deductible from the measure of HRS 239-6.

The Hawaii Supreme Court's opinion is reproduced in the Jurisdictional Statement submitted by Hawaiian Airlines (hereinafter referred to as H.A. Jur. Stmt.) at A-1 to A-27. After a brief statement of the facts and proceedings, the court analyzed the Hawaiian tax in question, noting that the tax is a direct descendant of the Public Utility Tax which was adopted in 1932 (*id.* at A-8 to A-9). The court explained:

> Our Territorial predecessors considered the nature of the levy in question early in the history of the Public Utility Tax; they concluded it "imposes a tax comparable to the *ad valorem* real and personal property taxes otherwise imposed" by the laws of the Territory of Hawaii. *Hawaii Consolidated Railway v. Borthwick,* 34 Haw. 269, 281 (1937), *aff'd* 105 F.2d 286 (1939).

The Hawaii Supreme Court then stated:

> Turning to the federal statutes, we initially note the Airport and Airway Development Act of 1970, 84 Stat. 219 (the Development Act) and the Airport and Airway Revenue Act of 1970, 84 Stat. 236 (the Revenue Act) were passed in tandem "to provide for the expansion and improvement of the Nation's airport and airway system." H. R. Rep. No. 91-601, 91st Cong., 2d Sess., 1, *reprinted in* [1970] U. S. CODE CONG. & AD. NEWS 3047, 3047. In short, the Development Act declared a congressional policy to increase federal expenditures for the foregoing purpose and the Revenue Act was designed to provide the means for implementation. "In substantial part, this purpose . . . [was] to be achieved through the imposition and application of airport and airway user charges." *Id.* Certain taxes already in existence were increased and other new aviation user taxes were imposed to finance the desired expansion and improvement of the system. *See* 26 U. S. C. Sections 4261 and 4271. The taxes imposed on the air transportation

> of persons and property were made payable in each case "by the person making the payment subject to the tax." 26 U. S. C. Sections 4261 (d) and 4271 (b) (1). And an Airport and Airway Trust Fund was established to serve as the repository of the taxes collected and the moneys appropriated for the program.

(H. A. Jur. Stmt. at A-9, A-10 to A-11) (brackets in original; footnotes omitted).

In support of its statement, the Hawaii Supreme Court explained at note seven of its opinion:

> The legislative rationale for imposing the taxes on the ultimate users of air transportation was stated as follows:
>
> > The Ways and Means Committee's action, insofar as commercial carriers are concerned, obtains most of the additional tax revenue from passenger and freight ticket taxes by increasing the present 5-percent passenger ticket tax to 8 percent and by imposing a new $3 "head" tax on passenger tickets for international flights and a new 5-percent "waybill" tax on air freight.
> >
> > The decision to derive the bulk of additional commercial aviation revenue from the passenger and freight ticket taxes was based upon three primary factors. First, extensive administrative experience is available from the present collection of the 5-percent passenger tax .... Second, a tax upon the value of a ticket or waybill will grow not only as air traffic increases in volume but also as prices rise. Third, a ticket tax is geared to charge an equitable tax related to the distance traveled and the cost per mile of air operation.... Ticket taxes on passengers and shippers are therefore an efficient and equitable user charge imposed directly on the ultimate passenger and freight users of the commercial sector of the aviation system.

H. R. Rep. No. 91-601, *supra* at 38-39, [1970] U. S. CODE CONG. & AD. NEWS, at 3084.

(H. A. Jur. Stmt. at A-11).

The Hawaii Supreme Court then noted:

> Two years later Congress' attention was redirected to the program by a perceived need for even greater federal funding of the costs of airport development. But in the meanwhile the Supreme Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U. S. 707 (1972), had been issued. . . . Fearing a proliferation of similar charges at airports throughout the country, Congress included the provisions presently codified as 49 U. S. C. Section 1513 in the Airport Development Acceleration Act of 1973, 87 Stat. 88-90 (1973). That the proscriptions embodied therein were in response to the judicial approval of the new head taxes adopted by state and local governments subsequent to the passage of the Airport and Airway Development and Revenue Acts of 1970 is expressly confirmed by a pertinent legislative document. *See* S. Rep. No. 93-12, 93d Cong., 1st Sess. 1, *reprinted in* [1973] U. S. CODE CONG. & AD. NEWS 1434.[9]

(H. A. Jur. Stmt. at A-12).[1]

The Hawaii Supreme Court then examined the language of Section 1513. In Part IV. of its Opinion (*id.* at A-17 to A-25), the court sought to "harmonize the seeming contradictions" (*id.* at A-14) between subsection (a) and subsection (b). The Hawaii court reviewed the

---

[1]Note nine of the Hawaii Supreme Court's decision continued as follows:

The report states in relevant part that:

> S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in

(Continued on next page)

preemption decisions of this Court and concluded that only taxes imposed directly or indirectly on persons using air transportation services were preempted by the provisions of Section 1513(a). More particularly, the court's reasoning was that the Hawaii tax was a tax in the nature of a property tax specifically excepted from subsection (a) by subsection (b). (H. A. Jur. Stmt. at A-22). In this consolidated appeal, the airlines, supported by the Air Transport Association of America (hereinafter referred

---

(Continued from previous page)

response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc., et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

S. Rep. No. 93-12, *supra*, at 17, [1973] U. S. CODE CONG. & AD. NEWS, at 1446.

This intent to preempt the levy of head or other user taxes is also stated in several other places in the report, to wit:

The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

S. Rep. No. 93-12, *supra*, at 4, [1973] U. S. CODE CONG. & AD. NEWS, at 1435 and

S. 38 contains a prohibition on State taxation of passengers or on the carriage of passengers in air transportation. This prohibtion will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax.

S. Rep. No. 93-12, *supra*, at 11-12, [1973] U. S. CODE CONG. & AD. NEWS, at 1441.

(H.A. Jur. Stmt. at A-12, A-13).

to as ATA) and the Solicitor General as *amici*, contend that even though the PSC Tax as applied to airlines is not a *tax* prohibited by Section 1513(a), and even though the PSC Tax is a *tax* expressly permitted by Section 1513 (b), it nevertheless cannot be measured by gross receipts or gross income[2] from the transportation of persons.

SUMMARY OF ARGUMENT

The issue here is what tax restrictions Congress intended to impose on the states and their political subdivisions (hereinafter referred to as the states) by enactment of Section 1513. Legislative history reveals Congressional intent only to prevent the states from: (1) directly or indirectly imposing taxes similar to the federal taxes already imposed by Congress on users of air transportation (I. R. C. Sections 4261 and 4271); and (2) imposing discriminatory taxes on airlines that, in effect, would impose the forbidden federal user taxes by an indirect means. More specifically, Congress feared the proliferation of head taxes or charges, which the states were increasingly utilizing both to obtain revenue to fund airport development and safety, and to raise funds for general revenue purposes. To prevent the proliferation of local taxes, Congress enacted Section 1513 (a). As a *quid pro quo*, Congress also increased federal user taxes and federal funding for airport development and safety.

That Congress decided to prohibit the states from directly or indirectly imposing taxes on users of air transportation or from imposing discriminatory taxes on airlines does not support the conclusion that Congress intended to exempt the airlines from any general business

[2]This brief uses the terms "gross receipts" and gross income as synonyms.

or property taxes that are imposed to support general government expenditures. There is therefore no reason to conclude that the PSC Tax has been invalidated by Section 1513 to the extent that it is measured by gross income from air transportation of persons. If Congress intended to grant a general business tax or property tax immunity to airlines it could have done so—but it did not. Subsection (b) does exactly the opposite: it expressly excepts these taxes from preemption.

Nothing in the legislative history supports the position advocated by the airlines, the Solicitor General, and the ATA (hereinafter sometimes referred to as the airlines and their *amici*) in these causes. Except for brief references to the specific discriminatory tax imposed by Ohio on the transportation of persons by air, the legislative history (including all witnesses testifying in hearings held by both houses of Congress) is devoted entirely to the subject matter of state user taxes, especially "head taxes." These taxes are similar to the federal user taxes (I. R. C. Sections 4261 and 4271) enacted by Congress to finance airport development and safety. The ATA generally represented the nation's scheduled airlines in the Congressional hearings. While objecting to Ohio's discriminatory tax, an ATA spokesman specifically stated that the airlines were not seeking any Congressional immunity or exemption from general business or property taxes.[3]

---

[3] "The airlines pay all the taxes that other business enterprises pay in the State of Ohio . . . but we do not want to be singled out as one industry in that State to provide for this particular State's obligations." Bills to amend the Airport and Airway Development Act of 1970: Hearings on H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. 98-99 (Mar. 14, 15, 20, 22, & 27, 1973) (Leg. Hist. App. at 136-37).

Consistent with this intent and history, Congress enacted Section 1513. Subsection (a) expressly prohibits the states from imposing any *taxes* directly or indirectly *on* persons or *on* the carriage of persons in air commerce or *on* the sale of air transportation or *on* the gross receipts derived therefrom. Subsection (b) expressly limits subsection (a) to these specific *taxes*. It expressly permits the states to impose general business and property taxes on airlines, such as property taxes, franchise taxes, net income taxes, and gross receipts taxes.

Admittedly, the PSC Tax is a tax expressly included within subsection (b) because it is reasonably characterized as a property tax. Otherwise, the airlines would not continue to pay this tax less the deductions they claim here. After voluntarily paying the PSC Tax for a number of years after the effective date of Section 1513, the airlines are now belatedly contending that subsection (a) is not limited to the proscription of certain taxes. They argue that subsection (a) precludes the imposition of *any tax* on airlines, including those expressly permitted by subsection (b), to the extent the tax is *measured by gross receipts* from air transportation of persons. In substance, they would rewrite subsection (a) to read in part as follows:

> **The States are prohibited from imposing any nondiscriminatory general business or property taxes on airlines to the extent measured by gross income from the transportation of persons by air, but the States are not prohibited from imposing any general business or property taxes that are measured by any other method.**

This argument assumes that requiring airlines to pay their fair share of state general taxes (which happen to be measured by gross receipts), conflicts with Congressional policy to preempt state taxes paid by users of air tran-

sportation. The principal argument advanced by the Solicitor General would expand this totally illogical and unsupportable basic assumption. (Br. for the United States at 6-12). This assumption is neither supported by any language of Section 1513 nor by any legislative history of ADAP, including Section 1513. It conflicts with Congressional intent to balance carefully the taxes preempted by Section 1513 (a) with increased federal expenditures to the states for airport development and safety. The general business and property taxes on airlines that are admittedly permitted by subsection (b), if measured by methods other than gross receipts, may be equally or even more burdensome on airlines than if measured by gross receipts.

In addition, the airlines' argument is not supported by Congressional concern with: (1) state duplication of federal user taxes; (2) discriminatory taxes imposed on airlines; or (3) any federal involvement in airport development or safety. This argument is nothing more than a belated effort by the airlines and their *amici* to mechanically construe the language of subsection (a) to preferentially grant airlines a deduction in computing the PSC Tax. This deduction is expressly denied by subsection (b) and is totally unrelated to ADAP purposes or policies. This argument of the airlines derives from an unsupported expansion of the phrase "or on the gross receipts derived therefrom" contained in Section 1513 (a).

ARGUMENT

I. Introductory Considerations.

The basic issue in this case is whether Congressional enactment of ADAP (including Section 1513) evidences

intent to exempt the airlines from the PSC Tax to the extent measured by gross receipts from air transportation. In spite of the specific language of subsection (b) that permits the imposition of the PSC Tax, the airlines and their *amici* contend that Congress unambiguously intended to do so.[4] They contend that even though the PSC Tax is a property tax, or other tax expressly permitted by Section 1513 (b), it still cannot be measured by gross income from air transportation. They base their argument on the unsupportable conclusion that Section 1513 (a) "will be rendered ineffective" (Br. for the United States at 2) unless their interpretation of Section 1513 (a) is adopted by this Court.

In contrast, Hawaii contends that absolutely nothing in the legislative history of ADAP supports a Congressional intent to specifically exempt airlines from the PSC Tax because it is measured by gross income (rather than by any other measure, such as *ad valorem* value of the airline's tangible and intangible properties), which could produce an equivalent or greater tax burden on the airlines.

II. The Legislative History Of Section 1513 And ADAP Reveals That Congress Did Not Intend To Exempt The Airlines From The PSC Tax To The Extent Measured By Gross Receipts From Air Transportation Of Persons On Inter-Island Flights.

A. Introductory Considerations.

The controlling question in interpreting any statute is to determine legislative intent. This in turn requires the application of proper rules of statutory construction

---

[4]This argument conflicts with the airlines' appeal only from that portion of the PSC Tax measured by gross income from air transportation *of persons*. The airlines' appeal was apparently based on the reasoning that the inclusion of receipts from the transportation of persons in the measure of the PSC Tax was equivalent to a "head tax or charge" on the carriage of persons in air transportation.

and requires an examination of the statutory language in reference to the legislative history and basic policies and goals sought to be achieved by the legislation. Before engaging in a detailed examination of the Congressional history of Section 1513 and ADAP, it is important to consider the policies and goals that Congress intended to implement. In enacting ADAP, Congress intended to improve aviation by improving airport facilities. As a matter of policy, Congress also intended to finance ADAP by levying taxes upon users of air transportation. The controversy in this case derives from differing views of the nature and extent of the restrictions that Congress imposed on the taxing powers of the states to implement these policies.

An examination of the legislative history demonstrates that Congress intended only to prohibit the states from directly or indirectly duplicating the federal taxes required to be paid by the users of air transportation. The legislative history also reveals that the only justification for the restrictions on state and local imposition of even these taxes was to eliminate: (1) the need for local user taxes (such as head taxes) by increasing the federal user taxes earmarked for expenditure toward airport development and safety; and (2) the impediment to air transportation caused by local user taxes, irrespective of whether the airlines or the users were required to pay the taxes. Congress was also concerned that: (1) some local jurisdictions were implementing user taxes to fund general revenue expenditures; and (2) local user taxes imposed discriminatory burdens on air travelers. Although not addressed in the legislative history in any significant manner, Congress was also concerned with *discriminatory taxes* on the airlines, such as the specific tax imposed on

airlines by Ohio. Contrary to the position of the airlines and their *amici,* nothing in the Conference Reports, the Bill Reports, the Congressional Record, or the Hearings remotely suggests that Congress intended to exempt airlines from general nondiscriminatory business or property taxes, such as the PSC Tax, to the extent these taxes were measured by gross receipts from air transportation.

B. An Examination Of The Legislative History Of 49 U. S. C. Section 1513 Demonstrates That Congress Intended To Preempt Specific User Taxes That It Had Previously Imposed To Fund Airport Development And Safety: This Type Of Tax May Generally Be Characterized As A "Head Tax."[5]

The 1973 Senate Bill Report characterizes S. 38 as having two purposes: "to increase Federal financial assistance for airport development throughout the United States" and to prohibit "the levying, by State and local governments, of passenger 'head' taxes or user taxes on the carriage of persons in air transportation."[6] The Congressional history of S. 38 and its predecessor bills also establishes that Congress was concerned with any state tax that singled out either air transportation users or the airlines for discriminatory treatment by imposing a specific tax on the gross receipts of air transportation (as contrasted with a property tax or a general business tax measured by gross receipts) which in actual economic substance would constitute an indirect head tax. This is illustrated by Ohio's tax imposed on air transportation. See *United*

---

[5]This brief uses the phrase "head tax" to mean a tax on each person that is a member of a designated class or group. In this case, it represents a tax levied on air passengers and may be either a flat rate tax or a percentage of fare tax. The tax may be either a direct tax collected from each passenger (as an enplaning or deplaning fee) or an indirect tax imposed upon the airline but ultimately paid by the passenger.

[6]S. Rep No. 93-12, 93rd Cong., 1st Sess. 4 (Feb. 1, 1973) (Leg. Hist. App. at 110).

Airlines, Inc. v. Porterfield, 28 Ohio St. 2d 97, 276 N. E. 2d 629 (1971). The Ohio tax was briefly discussed and properly described in the 1973 House Hearings as "unique . . . probably the only State in the 50 states that has such a tax."[7] The legislative history is silent regarding Congressional intent to prohibit general business or property taxes imposed on airlines, regardless of the measure or rate of the tax.

To support the argument that Congress did not discuss, and did not intend to prohibit, general business or property taxes that happened to be measured by gross receipts, we have reproduced under separate cover as a supplemental appendix those portions of the legislative history concerning Section 1513 and preemption of state tax power. This Appendix of Legislative History (hereinafter cited as Leg. Hist. App.) demonstrates the complete absence of any material which remotely suggests that Congress intended that Section 1513 should preferentially exempt airlines from the PSC Tax or from any other general state business or property tax.

This brief next sets forth representative extracts of this material in relative order of importance: (1) Conference Reports; (2) Senate and House Bill Reports; (3) Congressional Record; and (4) Hearings.

1. The Entire Legislative History Conclusively Demonstrates That Congress Did Not Intend To Invalidate A Tax Like The PSC Tax To The Extent It Is Measured By Gross Receipts:

a. The 1972 House Conference Report On S. 3755.[8]

---

[7] Bills to Amend the Airport and Airway Development Act of 1970: Hearings on H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. 246 (Mar. 14, 15, 20, 22, & 27, 1973) (Leg. Hist. App. at 142).

[8] H. R. Conference Rep. No. 92-1543, 92d Cong., 2d Sess. (Oct. 5, 1972) (Leg. Hist. App. at 93).

In material part, this report indicates that the House agreed to the Senate version of what ultimately became Section 1513. The only explanation of Section 1513 that would aid in its interpretation is that it was intended "to prohibit certain State taxation of persons in air commerce."[9]

b. **The 1973 House Conference Report On S. 38.**[10]

In material part, this report refers to the 1972 Conference Report on S. 3755.

c. **The 1972 House Report On H. R. 14847.**[11]

On page two of the report, the subcommittee noted as follows:

> On June 19 and 23, 1972, the Subcommittee on Transportation and Aeronautics held hearings on H.R. 2337, H.R. 10326, H.R. 10470, H.R. 10864, H.R. 14847, and H.R. 14991. The hearings revolved around the question of State and local taxation and the Federal share of funds to be used for airport construction, maintenance, and improvements. Interest in the hearings was augmented by recent United States Supreme Court cases [*Evansville*] upholding the constitutionality of enplaning charges on passengers using scheduled aircraft. . . . Witnesses representing virtually all segments of air transportation appeared. Their presentations ranged from recommendations against any legislation to recommendations of a permanent prohibition *against State and local charges on air passengers.*

Id. at 2 (emphasis added except case citation) (Leg. Hist. App. at 68-69).

The House bill contained a moratorium to study the head tax problem and the 1972 House report discussed enplaning and/or deplaning charges that were upheld by

---

[9]*Id.* at 1 (Leg. Hist. App. at 93).

[10]H. R. Conference Rep. No. 93-225, 93rd Cong., 1st Sess. (May 24, 1973) (Leg. Hist. App. at 179).

[11]H. R. Rep. No. 92-1279, 92d Cong., 2d Sess. (Aug. 2, 1972) (Leg. Hist. App. at 66).

this Court in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U. S. 707 (1972). The House report noted that, subsequent to *Evansville*, fourteen other airports enacted enplaning and/or deplaning charges.

d. **The 1972 Senate Report On S. 3755.**[12]

In material part, the report of S. 3755 is reproduced *verbatim* in the 1973 Senate report on S. 38.

e. **The 1973 House Report On H. R. 6388.**[13]

On page 2 (Leg. Hist. App. at 159-60), this report noted that it extended from July 1, 1973 to December 31, 1973 "the period of time within which certain State or local taxing authorities which have been levying or collecting *airline passenger head taxes* will be exempt from the prohibition against such taxes provided by the reported bill." The committee, under the section titled "Purpose," noted in part:

> H.R. 6388 . . . *prohibits the levying and collecting, by State and local governments, of passenger use taxes ("head taxes") on persons traveling in air commerce or on the sale of air transportation.*
>
> . . . .
>
> H.R. 6388 prohibits the so-called "head tax" by any governmental agency other than the United States, on the carriage of persons in air transportation.

Id. at 2-3 (emphasis added) (Leg. Hist. App. at 160).

Under the heading, "Background and Need," the Report continues:

> *More than forty State and local governmental agencies have enacted a passenger user tax, the so-called "head tax," in an effort to generate new revenue.*
>
> . . . .

---

[12]S. Rep. No. 92-1005, 92d Cong., 2d Sess. (Aug. 1, 1972) (Leg. Hist. App. at 62).

[13]H.R. Rep. No. 93-157, 93rd Cong., 1st Sess. (Apr. 19, 1973) (Leg. Hist. App. at 158).

Congress never intended for local and State agencies to raise money for airports by the use of such taxes. The Committee feels that the head tax is an unnecessary burden on interstate commerce, that it is discriminatory, and that it has a stifling affect on air transportation.

. . . .

The Committee reported legislation (H.R. 14847) on July 26, 1972 which would have authorized the Civil Aeronautics Board to conduct a one-year study to determine the financial needs at airports which are funded in whole or in part at a State or local level. In order to give the Congress time to review such investigation an 18-month moratorium on the so-called head taxes was passed. The House passed H.R. 14847 with amendments on August 18, 1972.

The Senate Commerce Committee reported a different measure on August 1, 1972, and it passed the Senate on August 10, 1972, (S. 3755).

The conferees met and agreed to a compromise in October 1972.

. . . .

The Committee has also extended an exemption until December 31, 1973 for several airports using the head tax. States levying and collecting the head tax before May 21, 1970 (the date the Airport and Airway Development Act of 1970 became law) are exempt from the prohibition until December 31, 1973. . . .

Id. at 4-5 (emphasis added) (Leg. Hist. App. at 162-64).

f. The 1973 Senate Report On S. 38.[14]

The purpose of S. 38 was explained in the 1973 Senate report as follows:

> The legislation to provide increased Federal participation in airport development grants is required because of the serious financial difficulties being experienced by many local government agencies who bear the responsibility to build, operate and maintain the nation's system of publicly owned airports. The

[14] S. Rep. No. 93-12, 93rd Cong., 1st Sess. (Feb. 1, 1973) (Leg Hist. App. at 108).

funds required to increase the Federal share of airport development grants will come from the Airport and Airway Trust Fund established by the Airport and Airway Revenue Act of 1970. The fund is funded from revenues from user taxes on aviation system users and contains and will contain adequate revenues to cover the cost of the increased Federal assistance.

. . . .

The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

Id. at 4 (emphasis added) (Leg. Hist. App. at 111).

Under the heading, "Background and Discussion," the report noted:

Under the Act, substantial new and increased taxes were levied upon aviation users to support the capital development program.

Id. at 7.

S. 38 contains a prohibition on State taxation of passengers or on the carriage of passengers in air transportation. This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports —namely the passenger head tax. This provision will be discussed later but *the Committee points out here that in denying government agencies potential revenues from passenger head taxes, it is also responding to the local need for greater Federal assistance in airport grants.*

Id. at 14 (emphasis added) (Leg. Hist. App. at 112).

Under the heading "Prohibition of State and Local Taxation," (*id.* at 17) (Leg. Hist. App. at 112-14) this report further comments:

> S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972, Supreme Court decision . . . [*Evansville*] . . . While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.
>
> . . . .
>
> Recent experience with the Philadelphia tax is indicative of the chaos which such local taxation works on the national air transportation system. The head tax brings on confusion, delay, anger and resentment and cuts against the grain of the traditional American right to travel among the States unburdened by travel taxes. Two newspaper accounts are printed below describing the situation created by the Philadelphia head tax which became effective July 1, 1972.[15]

The report then noted that:

> Whether the passenger pays the head tax, or it is absorbed by the airlines, the end result is to raise the cost of air travel.
>
> . . . .
>
> The head tax imposes a flat rate on passengers, regardless of the distance traveled by the passenger. Therefore, the "short haul" passenger, paying a $1 tax has the price of his ticket increased about 10% while a transcontinental passenger's ticket increases less than 1%. . . .
>
> . . . .

---

[15]These newspaper accounts describe the reaction of individual air passengers to the imposition of head taxes. The accounts are replete with quotes from irate air passengers, who were subjected to a head tax at the Philadelphia airport ticket counter.

> Quite clearly, if head taxes are to be used for non-aviation purposes or for programs which don't benefit the airport system where it is collected, such taxes are not equitable. . . . Air passengers are already being charged sufficiently at the Federal level through an 8% user charge on domestic tickets and $3 per person on international tickets, and it is not necessary to place a double burden on them.
>
> The bill reshapes the airport grant-in-aid program making use of the air passenger's money that is already in the Aviation Trust Fund, thereby making it easier for local communities to finance airport needs and ensuring that there is no need to resort to local head taxes.

Id. at 22 (Leg. Hist. App. at 119-21).

In the "Conclusion" to its report, the Senate Committee on Commerce stated:

> S. 38, as explained above provides a great new source of funds for airport development and improvement throughout the United States. The bill, if enacted, will reduce substantially the reliance on locally-generated funds for airport development and will place a greater burden and responsibility on the United States to encourage, promote and finance aviation facilities which are required in the national air transportation system.
>
> The bill provides that the cost of this increased Federal participation will be borne by the users of the system, not the general taxpayer. . . .
>
> . . . .
>
> . . . [T]he Committee views S. 38 as an aviation development package—the components of which cannot be separated. We believe that if the ***prohibition on local head taxes*** was not a part of the total new program, there would be need to re-evaluate the increased Federal funding for airport development projects called for in S. 38. ***If local taxes on passengers and air carriers*** are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program. If local

head taxes become a significant airport funding mechanism the public interest may well require a reduction in Federal user taxes and a diminution of Federal participation in airport development projects.

Therefore, by prohibiting state taxation on passengers or on air transportation, the Committee has accepted greater responsibility for U. S. assistance believing that the two actions must be viewed together and that neither should stand alone without the other.

Id. at 25-26 (emphasis added) (Leg. Hist. App. at 121-22).

g. **The 1972 And 1973 Congressional Record.**

Nothing in the extensive Congressional Record debates illustrates that Congress intended to invalidate a tax like the PSC Tax. To facilitate review, however, major portions from eighteen debates are reproduced in the separate Appendix of Legislative History.

h. **The 1972 House Hearings.**[16]

These hearings illustrate overwhelming concern with post *Evansville* head taxes. The testimony of Whitney Gillilland, relied upon by the airlines to support the inclusion of "on the gross receipts derived therefrom,"[17] is located at 51-59 (Leg. Hist. App. at 37-51). Mr. Gillilland recommended an eighteen month moratorium to study the "head tax" problem. His testimony thus supports a restrictive approach, not the broad sweeping preemption relied upon by the airlines.

---

[16]Bills Concerning State Taxation and the Federal Share of Funds to be used for Airport Construction, Maintenance, and Improvements: Hearings on H. R. 2337; H. R. 14847, and H. R. 10326 (and identical bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce; 92d Cong., 2d Sess. (June 19 & 23, 1972) (Leg. Hist. App. at 34).

[17]Br. for Aloha Airlines at 20-21; Br. for Hawaiian Airlines at 19.

i. The 1972 Senate Hearings On S. 2397, S. 3302, S. 3611, And S. 3755.[18]

In his opening statement, Senator Cannon (the prime sponsor of the bill) stated as follows:

> Quite simply, S. 3611 prohibits State and local governments from levying taxes, use fees, or other charges on passengers in air transportation.
>
> . . . .
>
> . . . Today's hearing is intended to provide an opportunity for all interested parties to this controversy to present to the committee their views as to whether the Federal Government is to prohibit local taxation of airline passengers.

Id. at 129-30 (Leg. Hist. App. at 7-8, 9).

The text of S. 3611 simply provided: "Sec. 1113. No State (or any political subdivision thereof) shall levy or collect a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation."[19] In regard to an inquiry by Senator Stevens as to whether the bill would apply to landing fees, Senator Cannon stated: "the language as it was drafted by Senate Legislative Counsel . . . was intended to be directed toward the head tax."[20] Statements of various witnesses that appeared before the Committee reiterated time and time again the problems related to the proliferation of head taxes. Mr. Tipton, President of the Air Transportation Association of America, testified orally[21] and submitted a prepared

---

[18]Bills to Amend the Airport and Airway Development Act of 1970: Hearings on S. 2397, S. 3302, S. 3611, and S. 3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2d Sess. (Apr. 25 & 26, June 12, 1972) (Leg. Hist. App. at 6).

[19]*Id.* at 134 (Leg. Hist. App. at 10).

[20]*Id.* at 157.

[21]*Id.* at 163-68 (Leg. Hist. App. at 17-22).

statement.[22] All of his testimony and every statement in his prepared statement refers to state and local head taxes.[23]

In the conclusion to his statement the ATA President recites: "The ADAP changes, *along with the prohibition of state or local head taxes,* would assure the sustained development of the nation's airports in conformity with a uniform, national plan."[24]

---

[22] *Id.* at 168-74 (Leg. Hist. App. at 22-33).

[23] The headings of Mr. Tipton's prepared statement begin as follows:

1. State and local head taxes are inconsistent with the uniform national program.
2. State and local head taxes would complicate and burden air travel.
3. State and local head taxes add to travel costs and inhibit air travel.
4. State and local head taxes aren't necessary.

Id. at 169-71 (Leg. Hist. App. at 24-27).

The following subheadings appear in Mr. Tipton's background statement titled "Facts About Head Taxes:"

1. A head tax is a "double tax" on the air traveler.
2. A head tax serves to discourage air travel.
3. A head tax penalizes the short-haul traveler much more than the long-haul traveler, even though they both make use of the same airport services.
4. A head tax tends to penalize the residents of the taxing community.
5. A head tax is an inequitable and discriminatory means of raising revenues to support a local airport.
6. A head tax is a "self defeating" attempt to provide funds for airport development.
7. A head tax encroaches upon our traditional freedom to travel.

Id. at 172-73 (Leg. Hist. App. at 31-33).

[24] *Id.* at 172 (emphasis added).

j. The 1973 House Hearings On H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, And S. 38.[25]

Representative Jarman, Chairman of the Subcommittee on Transportation and Aeronautics, at the commencement of the hearings, stated in part:

> The bills before us in the hearing which we are commencing this morning deal with the levying and collecting of service charges on enplaning passengers. Following a Supreme Court decision in [*Evansville*] upholding such charges, a number of local jurisdictions have taken steps to collect similar charges. We have the question as to whether there should be a Federal preemption in this area and whether local charges should be prohibited.

Id. at 1.

In commenting on this problem, Mr. Kuykendall stated: "the idea of the proliferation of added costs to the passenger is our overbearing concern here."[26] At the request of Mr. Dingel, the Department of Transportation submitted information showing that 44 localities had enacted head taxes as of March 1973[27] and that all of the taxes were local except for six state-owned airports in New Hampshire. Some of these taxes were collected by the airport authority and others were required to be collected by the airline carrier.

2. Legislative History Conclusion.

Nothing in the legislative history of Section 1513 suggests that Congress was concerned with anything other

---

[25] Bills to Amend the Airport and Airway Development Act of 1970: Hearings on H. R. 4082, H. R. 2695, H. R. 4213, H. R. 4214, H. R. 4182, and S. 38 Before The Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. (Mar. 14, 15, 20, 22, & 27, 1973) (Leg. Hist. App. at 132).

[26] *Id.* at 64.

[27] *Id.* at 65.

than direct or indirect taxes on users of air transportation, generally characterized in the legislative history as "head taxes." Furthermore, the legislative history ties the restrictions of Section 1513 (a) both to increased federal taxation of users of air transportation and to increased federal spending to support airport development. As a *quid pro quo* for imposing Section 1513 (a) restrictions on the states, Congress increased federal financial support for airport development and safety, thereby eliminating the need for local head tax revenues. This pattern indicates a Congressional intent not to disturb a state's general business tax or property tax imposed for general governmental purposes.

Nothing in the legislative history of Section 1513 (a) explains the phrase "or on gross receipts derived therefrom." Nor is there anything in the briefs of the airlines or their *amici* that in any way substantiates their claim that this phrase was added to Section 1513 (a) to prohibit the states from measuring the taxes specifically permitted by Section 1513 (b) by the gross receipts that airlines receive from air transportation.

In addition, nothing in the Congressional history of Section 1513 supports *any reason* why the PSC Tax should be held invalid, irrespective of its measure. The measure of this tax by methods other than gross receipts, which admittedly is beyond the prohibition of Section 1513 (a), could impose an economic burden on the airlines that is equal to or greater than the burden imposed by the PSC Tax as presently measured by gross receipts. Significantly, the testimony and written statements of the ATA President neither mention nor discuss restricting general business or property taxes on airlines. On the contrary, he specifically stated that the airlines were will-

ing, ready and able to pay their share of general business taxes that did not discriminate against airlines or the users of air transportation services. [28] The ATA testimony, and the delay of the airlines in bringing these actions, indicate that they initially believed that Section 1513 did not restrict the measure of any taxes expressly permitted by subsection (b).

In sum, the legislative history, in conformity with both a rational and a technical interpretation of Section 1513, demonstrates that the PSC Tax is not a tax prohibited by Section 1513 (a).

III. As A Matter Of Statutory Interpretation, Section 1513 Does Not Prohibit Hawaii's PSC Tax As Applied To Airlines, Even Though The PSC Tax Is Measured By Gross Receipts From Air Transportation.

A. Introductory Considerations.

On its face, Section 1513 raises issues of statutory interpretation. If this were not true, the airlines would not have voluntarily paid the taxes in question for several years after Section 1513 was enacted. Furthermore, even if the language of Section 1513 is unambiguous on its face, as contended by the airlines and their *amici*, applicable rules of statutory construction and the legislative history leading to its enactment should still be considered. For, "[t]he meaning to be ascribed to a statute can only be derived from considered weighing of every relevant aid to construction."[29] Proper rules of statutory construction are particularly important here because the legislative history, as discussed above, refutes the airlines'

---

[28] See *supra* note 3.

[29] 73 Am. Jur. 2d *Statutes* Section 147 (1974).

position. The airlines' suggested interpretation produces discriminatory, illogical, and inequitable results that were not intended by Congress and which are not supported by the voluminous legislative history.

B. Applicable Rules Of Construction.

Irrespective of the alleged unambiguity,[30] the legislative history and appropriate rules of statutory construction (see *supra* Part II) are relevant in formulating a reasonable interpretation and application of Section 1513. "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *FBI v. Abramson*, — U. S. —, 102 S. Ct. 2054, 2061 n.7, 72 L. Ed. 2d 376, 386 n.7 (1982) quoting *United States v. Monia*, 317 U. S. 424, 431 (1943) (Frankfurter, J., dissenting). The duty of the Court is "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Abramson* at n.7, quoting *NLRB v. Lion Oil Co.*, 352 U. S. 282, 297 (1957) (Frankfurter, J., concurring and dissenting).[31]

Even when there is no ambiguity in the literal language of a statute, this Court has historically recognized that the language cannot be construed to defeat the obvious intent of Congress or to reach an absurd result. See *Corn Products Refining Co. v. Commissioner*, 350 U. S. 46 (1955); *Markham v. Cabell*, 326 U. S. 404 (1945); *United*

---

[30]See generally Nutting, *The Ambiguity of Unambiguous Statutes*, 24 Minn. L. Rev. 509 (1939).

[31]The various principles of statutory construction that refute the position of the airlines are set forth in 73 Am. Jur. 2d *Statutes* §§ 145-46, 149, 153-55, 160, 259 & 269 (1974).

States v. American Trucking Association, 310 U. S. 534, 542-44 (1940); *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892). Thus, "if the literal import of the text of an act is not consistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified by the intention of the legislature." 2A *Sutherland Statutory Construction* 65 (C. Sands 4th ed. 1973) (citing *United States v. Alpers*, 338 U. S. 680 (1950) and *United States v. Public Util. Comm'n.*, 345 U. S. 295 (1953) as to "meaning or intent"; citing *United States v. Brown*, 333 U. S. 18 (1948) as to "absurd results").

In sum, rules of statutory construction require this Court to interpret all of the provisions of Section 1513 to produce a rational harmonious whole consistent with the Congressional intent and purpose behind ADAP.[32] The legislative history shows that Congress did not intend to prohibit the PSC Tax to the extent measured by gross receipts from air tranportation, while simultaneously permitting the same tax and all other general business taxes to the extent measured by any other method. Such an interpretation leads to absurd and inequitable results that are alien to any Congressional purpose in enacting ADAP.

C. Constitutional Standards For Preemption.

Section 1513 should also be interpreted in accordance with the constitutional standards for preemption.

---

[32]While the airlines, the ATA, and the Solicitor General argue that these inquiries are unnecessary, they devote a substantial portion of their briefs to Congressional policy and history. (See Br. of Aloha Airlines at 18-23; Br. of Hawaiian Airlines at 16-27; Br. for the United States at 6-10, 12; Br. of ATA at 6-13).

As stated in *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952):

> It will not be presumed that a federal statute was intended to supercede the exercise of the power of the states unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not so lightly to be presumed.

In construing Section 1513, this Court should "start with the assumption that the historic police powers [or taxing powers] of the States were not to be superceded by the Federal Act unless that was a clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (bracketed material added). Under the preemption standard, the inquiry is whether Congressional enactment of Section 1513, the user taxes contained in I.R.C. Sections 4261 and 4271, and other provisions of ADAP, demonstrate a "clear and manifest purpose" (*id.*) to preempt the PSC Tax to the extent it is measured by gross receipts that the airlines have derived from their business activities and properties in Hawaii.

IV. The Plain Language Of Section 1513 Does Not Prohibit States From Levying General Business Taxes Or Property Taxes—Such As The Hawaii PSC Tax Or Other Taxes Permitted By Subsection (b)—Even Though The Permitted Taxes May Be Measured In Whole Or In Part By Gross Receipts From Air Transportation.

Contrary to the airlines' argument that 49 U.S.C. 1513 is unambiguous, its literal language supports the construction that Congress did not intend to preempt the PSC Tax to the extent measured by gross income from air transportation. This is demonstrated by an examination of the language of Section 1513 (a) in *pari materia* with

the language of Section 1513 (b) & (c),[33] and also by comparing Section 1513 (a) to the actual taxes enacted by Congress to raise revenues for airport development and safety (I. R. C. Sections 4261 & 4271).

In material part, Section 1513 (a) only prohibits the states from levying or collecting *a tax, fee, head charge, or other charge*, directly or indirectly: (1) *on* persons traveling in air commerce; (2) *on* the carriage of persons traveling in air commerce; or (3) *on* the sale of air transportation. At the end of this list in Section 1513 (a), Congress added the words "or on the gross receipts derived therefrom." Since a standard rule of statutory construction is that, absent evidence to the contrary, a provisory clause refers only to the last antecedent,[34] the phrase "on the gross receipts derived therefrom" applies only to charges "on the sale of air transportation." "Air transportation" is

---

[33]Section 1513(c) permits a "head tax on passengers" to be imposed by airport authorities until December 31, 1973. If the term "head taxes," as used in subsection (c), did not refer to all the taxes referred to in subsection (a), the following unwarranted and absurd construction would follow: during the time period between enactment and the December 31, 1973 extension in subsection (c), Congress would be imputed with the illogical and unwarranted intent to permit head taxes but prohibit all other subsection (a) taxes other than head taxes.

[34]As stated 2A *Sutherland Statutory Construction* 159 (C. Sands 4th ed. 1973) (footnotes omitted):

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, which consists of "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence."

Citing *Azure v. Morton*, 514 F.2d 897 (9th Cir. 1975); *Quindlen v. Prudential Ins. Co.*, 482 F. 2d 876 (5th Cir. 1973); *Mandel Bros. v. Federal Trade Comm'n*, 254 F.2d 18 (7th Cir. 1958); *Buscaglia v. Bowie*, 139 F.2d 294 (1st Cir. 1943).

defined in 49 U. S. C. 1301(10) to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."[35] Thus there is no prohibition on taxes or charges on the sale of air transportation in intrastate commerce, which is the sole issue in this case.[36]

Further, even if the "last antecedent rule" is not applicable, Hawaii's PSC Tax is not prohibited. However construed, subsection (a) prohibits only taxes that are expressly imposed *on* persons or *on* the carriage of persons traveling in air commerce, or *on* the sale of air transportation, or *on* the gross receipts from the sale of air transportation. The PSC Tax is not imposed *on* any of these *subjects of taxation*. Rather, the tax is expressly imposed *on* all carriers (including airlines) as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value." HRS 239-6. The PSC Tax is: (1) *measured* by the

---

[35]In turn, "interstate air transportation," "overseas air transportation," and "foreign air transportation," are defined in 49 U. S. C. Section 1301(21) to mean respectively "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft in commerce between" points in one state and points in another state. In other words, it applies only to interstate or foreign transportation. The Solicitor General indicates, in the "Statement" in the Br. of the United States at 3, that the airlines are engaged in international air transportation in their inter-island flights in Hawaii because the flights pass over international waters. This argument places form over substance. It is not reasonable to assume that Congress intended that Section 1513 should be applied to intrastate flights over the Hawaiian islands any differently than to flights in the other forty-nine states.

[36]While the Br. for the United States at 3 indicates that the airlines' inter-island flights cross international waters and bring the airlines within the coverage of the Federal Aviation Act of 1958, this does not mean that the airlines are engaged in international or interstate commerce for taxation purposes. *See Federal Power Comm'n v. Union Electric Co.*, 381 U. S. 90, 95 (1965); *Polish National Alliance v. NLRB*, 322 U. S. 643, 649 (1944).

entire gross receipts from the airline business; (2) imposed on all intrastate carriers in lieu of an equivalent general business tax; and (3) reasonably classified as a property tax (See Part V below). It is not: (1) a discriminatory tax *on* airlines; (2) a tax *on* gross receipts; or (3) a tax *on* any *subjects of taxation* prohibited by Section 1513 (a).

That Section 1513 (a) was intended to prohibit only specific excise taxes imposed directly or indirectly on users of air transportation is supported by the language of subsections (b) and (c), as well as by a comparison of the language of Section 1513 (a) with the specific user taxes enacted by Congress to fund the ADAP program. Congress enacted subsection (b) to ensure that the language of subsection (a) could not be construed to embrace *subjects of taxation* (not their measures) other than those specifically enumerated in subsection (a). Subsection (b) limited subsection (a) to the *taxes* specifically contained in subsection (a). Subsection (b) expressly permits the states and their political subdivisions to impose *any other taxes*, with no reference to how they are measured, including "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services."

These taxes are general business or property taxes. They do not single out airlines for tax purposes. Unlike the Ohio tax, they are not directly or indirectly *imposed on* persons traveling in air commerce or *on the carriage of persons* traveling in air commerce or *on the sale of air transportation*. Irrespective of its measure, a property tax or a tax in lieu of a property tax (such as the PSC Tax) is imposed on the ownership and use of tangible and intangible property within the taxing jurisdiction. (See 1 T. Cooley, *The Law of Taxation* 869-73 (4th ed. 1924)). A franchise or other general business tax is imposed on

the exercise of a franchise or business privilege irrespective of how it is measured. *See Werner Machine Co. v. Director of Division of Taxation*, 350 U.S. 492 (1956). Thus the PSC Tax is not prohibited by subsection (a) and is a tax expressly permitted by subsection (b).

This interpretation of Section 1513 is not only supported by general rules of statutory construction and the preemption standards set forth in B and C above (cf. H.A. Jur. Stmt. at A-17 to A-20), but also by the legislative history of Section 1513 and the companion statutory construction rules of *noscitur a soccis* and *ejusdem generis*. *Noscitur a sociis* literally means "it is known by its associates." The legislative intent behind a certain word may be established by reference to associated or accompanied words. One of the longest standing and best articulated explanations of the principle is found in *Neal v. Clark*, 95 U.S. 704, 708-09 (1877).[37] This Court has recently repeated the *Neal* holding in *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (emphasis added):

> *The maximum noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, *is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.* See, e.g., *Neal v. Clark*, 95 U.S. 704, 708-709.

This rule is significant in interpreting Section 1513. Section 1513(a) employs the words "tax, fee, head charge, or other charge," a sequential enumeration of items with both general and specific characteristics. The terms "tax," "fee," and "head charge" are words of peculiar specificity. They refer to the enplaning and deplaning charges ("head taxes") that precipitated Congressional action after *Evans-*

---

[37] For a brief discussion of this principle see, 2A *Sutherland Statutory Construction* 101 (C. Sands 4th ed. 1973).

ville and are expressly addressed in Section 1513(c). *See supra* note 33; Br. of the States of Alaska, Arizona, Oklahoma, Washington, and West Virginia at 17-18. Accordingly, even if Section 1513(b) and (c) are ignored, the *noscitur a sociis* rule demonstrates that Section 1513 (a) only prohibits taxes in the category of "head taxes or charges," not a general business tax or property tax like the PSC Tax. This interpretation is specifically supported by subsection (b), which limits subsection (a) to a specific category of taxes, and by subsection (c), which extends the effective date of subsection (a) restrictions to December 31, 1973 for the collection only of a "head tax on passengers."

The other relevant rule, *ejusdem generis* (meaning "of the same kind, class or nature"), is a subrule of *noscitur a sociis.*[38] The *ejusdem generis* principle is triggered when general words follow specific words in an enumeration describing a legal subject. The general words should be construed as embracing only objects or things similar in nature to those objects or things enumerated by the preceding specific words. *See Cleveland v. United States,* 329 U. S. 14, 18 (1946); *Lyman v. Commissioner,* 83 F.2d 811, 813 (1st Cir. 1936).[39]

---

[38] *Id.*

[39] The inverse is also true: where general words are followed by specific words, the subsequent specific words operate to restrict the application of the prior general terms to things that are similar to those specifically enumerated. For example, in *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir. 1973), the court cited *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U. S. 222, 228-29 (1957), *MacEvoy Co. v. United States*, 322 U. S. 102, 107 (1944), and *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208 (1932) in support of its holding that:

> [t]he well-established doctrine of statutory construction denominated *ejusdem generis* . . . directs that a *general provision of a statute will be controlled and limited by subsequent statutory language more specific in scope.*

483 F.2d at 1135 (emphasis added).

Application of these two rules of construction yields a result that is consistent with Congressional intent to limit subsection (a) to a very narrow class of *taxes* imposed on users of air transportation, a class of taxes that are similar to the three user taxes enacted by Congress. These prohibited taxes do not include the PSC Tax or other Section 1513(b) taxes. Congressional intent to prohibit the states from levying (either directly or indirectly) the taxes listed in Section 1513(a) does not imply that Congress intended to restrict the means employed by the states to measure the taxes specifically permitted in 1513(b).

Further application of the rules *noscitur a sociis and ejusdem generis* to the *category or class of taxes prohibited* by subsection (a), compared to the *category or class of taxes permitted* by subsection (b), illustrates Congressional intent in enacting Section 1513. Congress intended to restrict only specific excise taxes on airlines *as a class* and to permit taxes on general businesses *as a class*. In other words, those taxes that single out users of air transportation or airlines as a class of taxpayers are prohibited by subsection (a). For example, assume that State A imposed a head tax of $1 on every resident of a state. This tax, being general in nature, would not be prohibited as to those residents that use air transportation because it is a tax on a class permitted by subsection (b). However, if State A imposed a head tax of $1 on users of air transportation, that tax would not be permitted because it is a tax on a class prohibited by subsection (a). This singling out of airlines for discriminatory taxation *as a class* of taxpayers was the basis of the ATA's testimony objecting to the Ohio tax. *See* 1973 House Hearings, *supra* note 3. The nature of the Ohio tax, as discussed by the ATA testimony, distinguishes the class of taxes prohibited by subsection (a) from the taxes permitted by subsection (b).

This analysis is not a matter of semantics or nomenclature. Head taxes, taxes on enplaning and deplaning of aircraft, or taxes on ticket sales can be repeated by various local jurisdictions in a discriminatory manner against users of air transportation *as a class* of taxpayers. This potential for abuse was a primary concern to Congress in enacting Section 1513 (See *supra* Part II/B at pp. 12-25). These prohibited taxes are readily distinguishable in incidence and effect from general taxes such as franchise taxes, net income taxes, property taxes, or sales and use taxes. General business taxes are related to the conduct of substantial business activities in the taxing jurisdiction and are not *specifically* imposed on an isolated taxable incidence in the taxing jurisdiction that is directly related to the flow of air commerce. Nor do general business taxes have anything to do with airport development, airport safety, or the imposition of taxes, either directly or indirectly, on persons using air transportation or using airport facilities. Neither can general business taxes be imposed to discriminate against either airlines or users of air transportation. Section 1513(b), by using the language "[n]othing in this section shall prohibit a state . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section" explicitly refers to specific kinds of taxes on a specific class of taxpayers. It does not restrict how the Section 1513(b) taxes on general classes of taxpayers are to be measured.

Significantly, the *subjects of taxation* prohibited by Section 1513(a) parallel the excise taxes actually imposed by Congress to Finance ADAP. Congress imposed three specific excise taxes on the users of air transportation under I.R.C. Sections 4261 and 4271: an 8% excise tax on the price of domestic flights; a 5% excise tax on the amount

paid for transportation of property; and a $3 head charge on international flights originating in the United States. These three specific excise taxes on air transportation are required to be *paid by the users* of the transportation. Congress imposed no special excise taxes or other special taxes which are required to be *paid by airlines.* It is thus reasonable to conclude that Congress enacted Section 1513(a) to preempt only comparable specific excise taxes or user taxes. This interpretation, which does not conflict with any ADAP policy, is supported by the express language of Section 1513, legislative history, rules of statutory construction, and constitutional preemption standards.

That Section 1513(b) permits general business taxes, irrespective of how these taxes are measured, is specifically supported by numerous decisions of this Court regarding the inclusion of exempt federal government obligations in state corporate franchise taxes that were measured by property, net worth, or net income.[40] It is also supported by decisions of the Court that have upheld the inclusion of gross receipts in the measure of state corporate franchise or property taxes. In these cases the Court held that a franchise tax or a property tax measured by gross receipts is not an unconstitutional burden

---

[40]See *Werner Machine Co. v. Director of Division of Taxation,* 350 U. S. 492 (1956); *Pacific Co. v. Johnson,* 285 U. S. 480 (1932); *Educational Films Corp. v. Ward,* 282 U. S. 379 (1931); *Flint v. Stone Tracy Co.,* 220 U. S. 107 (1911); *Cleveland Trust Co. v. Lander,* 184 U. S. 111 (1902); *Home Ins. Co. v. New York,* 134 U. S. 594 (1890); *Society for Savings v. Coite,* 73 U. S. (6 Wall.) 594 (1867); *Hamilton Co. v. Massachusetts,* 73 U. S. (6 Wall.) 632 (1867). As stated in *Werner Machine,* "This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property." 350 U. S. at 494.

on interstate commerce and is not a tax imposed directly or indirectly *on* gross receipts from interstate commerce. See *Great Northern Ry. Co. v. Minnesota*, 278 U. S. 503 (1929); *Pullman Co. v. Richardson*, 261 U. S. 330 (1923); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *United States Express Co. v. Minnesota*, 223 U. S. 335 (1912). Compare these cases with *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U. S. 326 (1887) and *Fargo v. Michigan*, 121 U. S. 230 (1887), in which this Court invalidated taxes *levied on* gross receipts from interstate commerce.

More recently, this Court recognized the distinction between a subject of taxation (its legal incidence) and its measure (how it is computed). This Court invalidated a Virginia tax levied on gross receipts in *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359 (1954) (*REA I*) and upheld the same Virginia tax, which was revised to levy the tax on property measured by gross receipts in *Railway Express Agency, Inc. v. Virginia*, 358 U. S. 434 (1959) (*REA II*). The rationale that distinguishes *REA II* and other comparable cases is stated as follows in 1 T. Cooley, *The Law of Taxation* 849 (4th ed. 1924) (bracketed material added):

> The reason for upholding such a tax [a tax *measured by* exempt gross receipts or capital stock as distinguished from a tax *on* gross receipts] is that the gross receipts or capital stock is not itself taxed but instead is merely used as a measure to value the tangible or intangible property, or both, belonging to the corporation inside the state.[41]

---

[41] See also L. Tribe, *Constitutional Law* 365 (1978).

The intergovernmental immunity cases of this Court represent an analogous line of cases. These cases hold that the

(Continued on next page)

Thus, the PSC Tax (a property tax or tax *in lieu* of a property tax), which is *measured* by gross receipts, is not a tax directly or indirectly imposed *on* gross receipts. Neither is it a tax imposed on the *sale* of airline tickets or on the *sale* of airline freight transportation. Taxes on sales are analogous to the taxes imposed by the federal government on air transportation. In contrast, the legal incidence of a property tax is on the property owned and used in the taxing state. Irrespective of how it is measured, a property tax will be held invalid if the measure employed either discriminates against interstate commerce or is not "legitimate as an ordinary tax upon the property, valued with reference to its use." *Pullman Co. v. Richardson*, 261 U. S. 330, 339 (1929). *See also Meyer v. Wells, Fargo & Co.*, 223 U. S. 298 (1912).

All of the cases cited above demonstrate that a constitutional difference exists—regardless if the immunity is derived from federal statute or implied under the Constitution — between a tax *imposed on* a prohibited subject of taxation and a tax imposed upon a nonprohibited subject of taxation even though the latter includes the prohibited subject of taxation in its measure. The controlling question is the legal incidence of the tax. The airlines and their *amici* build their interpretation of Section 1513 (a) upon the faulty premise that there is

---

(Continued from previous page)

scope of governmental immunity (express or implied) is dependent upon the legal incidence of the tax and not on its economic burden or its measure. *See United States v. City of Detroit*, 355 U. S. 466 (1958); *City of Detroit v. Murray Corp.*, 355 U. S. 489 (1958); *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110 (1954); *Alabama v. King & Boozer*, 314 U. S. 1 (1941); *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937). *See also United States v. New Mexico*, 455 U. S. 720 (1980) where the legal incidence of the tax was controlling for federal intergovernmental immunity tax purposes.

no constitutional or statutory difference between a subject of taxation and its measure.[42] Their conclusion that the PSC Tax, which is properly classified as a property tax under decisions of this Court, is a tax *on* gross receipts because it is *measured by* gross receipts, is erroneous.[43]

V. The Hawaiian PSC Tax Is Not Prohibited By 49 U. S. C. 1513 Because It Has Been Reasonably Classified As A Property Tax By The Hawaiian Legislature, Courts, And Tax Administrator.

The Hawaii Supreme Court's historical analysis of the PSC Tax indicates that it is properly characterized as *a*

---

[42]*Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274 (1977) repudiated a historical interpretation of the commerce clause and held that a corporate privilege tax measured by presumed interstate receipts derived from intrastate activities was not invalid as a tax imposed on the privilege of conducting interstate commerce. This holding does not mean that there is no constitutional difference, even under the commerce clause, between a subject of taxation and its measure. A ruling from this court that no difference exists between the subject of a tax and its measure would produce chaos in the state taxation of multistate-multinational businesses. For example, this difference has always been controlling in reference to a state's jurisdiction to tax. *See National Geographic Soc'y v. California Bd. of Equalization*, 430 U. S. 551 (1977); *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 80 (1938).

[43]This brief does not suggest that the measure of a tax is not relevant to determine what constitutes the true subject of taxation, since the measure must be reasonably related to the subject. For example, in *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298 (1912) this Court struck down an Oklahoma tax that purportedly constituted a property tax on going concern value measured by gross receipts from all sources. The Court invalidates the tax because the subject of the tax (property tax or going concern value) had no reasonable relationship to the measure of the tax (gross receipts). No such circumstance exists in this case and no one contends that it does.

property tax or a tax in lieu of a property tax.[44]

The PSC Tax is a direct descendant of the Public Utilities Tax, which was adopted in 1932. The airlines became subject to the Public Utilities Tax in 1933. (H.A. Jur. Stmt. at A-8). In 1939, the Public Utilities Tax was construed to impose a tax comparable to an *ad valorem* property tax. *Hawaii Consolidated Ry. Ltd. v. Borthwick*, 34 Hawaii 269, 281 (1937), *aff'd*, 105 F.2d 286 (9th Cir. 1939). In 1953, the airlines were exempted from the Public Utility Tax and subjected to the Hawaii General Excise Tax. In 1963, the legislature reconsidered this decision and decided to tax all intrastate carriers, including the airlines, under the Public Utilities Tax in order to avoid possible constitutional problems[45] with taxation of intrastate car-

---

[44]In commenting on the PSC Tax, the Hawaii Supreme Court stated:

> The legislature has deemed the State levy "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value." HRS Section 239-6. We would not quarrel with this legislative characterization; . . . As our Territorial predecessors concluded, there is ample legal support for avoiding "the difficulties encountered in *ad valorem* assessments of the real and personal property of utilities . . . by substituting a tax upon gross incomes from utilities from utility business, upon net income from the same source or both." *Hawaii Consolidated Railway v. Borthwick, supra*, 34 Haw. at 280. For the formula "give[s] effect to the intangible factors which influence real values." *Railway Express Agency v. Virginia*, 347 U. S. 359, 364 (1954) (quoted with approval in *Railway Express Agency v. Virginia*, 358 U. S. 434, 442 (1959)). *See also Illinois Central Railroad v. Minnesota*, 309 U. S. 157 (1940).

H.A. Jur. Stmt. at A-22.

[45]In 1963, the Hawaii General Excise Tax was on appeal to the Hawaii Supreme Court. The issue was whether the tax was a permissible privilege tax or a tax on gross receipts that was prohibited by the Commerce Clause. In 1965, the Hawaii Supreme Court held the general excise tax to be a permissible privilege tax measured by gross receipts. *HC&D Moving & Storage Co. v. Yamane*, 48 Hawaii 486, 405 P.2d 382 (1965).

riers under the General Excise Tax. The legislature accomplished this by enacting the PSC Tax in 1963 to replace the Public Utilities Tax. The PSC Tax: (1) amended the scope of the existing public utilities tax to cover all public utilities, including all intrastate carriers; and (2) expressly defined the amended public utilities tax as a property tax.[46]

Since 1963, airlines and other carriers have been subject to taxation pursuant to HRS 239-6, which delineates the basis and the rates for assessing the tax against motor carriers and common carriers by air and water. This tax is assessed against the carriers as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value and is in lieu of the tax imposed by Chapter 237 [the general excise tax measured by gross receipts]." HRS 239-6 (bracketed material added).

The case at bar contains the "trinity of agreement by three state agencies," found to be so persuasive in *REA II* (358 U. S. at 440) since the PSC Tax has been interpreted by the Hawaiian courts and administered by the Hawaiian Director of Taxation as a property tax in conformity with its legislative history and explicit statutory characterization. This state perspective is not conclusive on this Court, "but it cannot be rejected unless it can be said to be ill founded." *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 454 (1918). It is thus evident that the PSC Tax can reasonably be characterized as a property tax

---

[46]House Standing Comm. Rep. No. 792 (Finance Comm.), *reprinted in* 1963 House Journal 799; House Standing Comm. Rep. No. 850 (Ways and Means Comm.), *reprinted in* 1963 Senate Journal 950.

specifically permitted by Section 1513(b).[47] Furthermore, the gross receipts measure does not render the PSC Tax defective as a property tax as to the airlines (see *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298 (1912)) since the gross receipts of the airlines in question is approximately equal to the balance sheet value of their personal property located in Hawaii.[48]

The 1982 amendment of Section 1513, which added a new subsection (d) (reproduced in Br. for Hawaiian Airlines at A-2 to A-3) prohibiting discriminatory property taxation against the airlines,[49] shows that the PSC Tax is a permissible property tax under Section 1513 as amended. The PSC Tax is, therefore, *a fortiori*, a permissible property tax under Section 1513 as originally enacted without the prohibition against discriminatory property taxes. First, the tax complies with the anti-discriminatory standards of subsection (d): all commercial or industrial properties subject to a property tax

---

[47]The Br. for the United States at 15 & 16 states that the characterization of the tax as a property tax is simply a matter of labels since "its tax base and its economic incidence, can be nothing other than a gross-receipts tax forbidden by 1513(a)." This statement is totally erroneous because the *measure* of a tax must be reasonably related to the *subject of taxation*. The Hawaiian PSC Tax, as a property tax, must be reasonably related to the value of the tangible and intangible properties, including going concern values, of the airlines in Hawaii. *See Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n*, 390 U. S. 317 (1968) and *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298 (1912).

[48]For purposes of the 1978 PSC Tax, Hawaiian Airlines personal property, including going concern value, was valued at $69,079,368 by using gross income as a measure. This amount is less than the actual value of its Hawaii personal property for the same year of $71,142,168 [(Book value of assets of $79,577,370) X 89.4%, the portion of its assets in Hawaii] equals $71,142,168. The book property figures include a small amount of real property which is separately taxed (cf. H.A. Jur. Stmt. at A-23 n.14).

[49]Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 701.

levy by Hawaii are taxed in a manner that does not discriminate against the airlines.[50] Second, subsection (d)(3) specifically provides that "[t]his subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes." This implies that the term "property taxes" used in section 1513, as originally enacted and as amended, includes "in lieu" taxes or property taxes measured by gross receipts. Otherwise, there would be no purpose of including subsection (d)(3) in the 1982 amendment which excepted "in lieu" taxes used for airport or aeronautical purposes from the discriminatory property tax standards set forth elsewhere in subsection (d).

In sum, even if a literal reading of Section 1513 (before or after the 1982 amendment) is alone controlling,[51] there is no foundation for the airlines' argument that the PSC Tax is prohibited by subsection (a) and is not expressly permitted by subsection (b).

---

[50]All public utilities, except airlines and other carriers taxed under HRS 239-6, are subject to the assessment and levy imposed under HRS 239-5 of the PSC Tax. Section 239-5 provides for taxation of the real and personal property of the public utilities covered by its provisions measured by a rate not "less than 5.885% or more than 8.2%" of the gross income from the public utility business. Although the airlines are taxed at a 3% rate on personal property only, and are taxed separately on real property under the real property tax law, the combined rate for both taxes (less than 3.2% for all tax years in question) is still substantially less than the 5.885% rate that the other public utilities pay for taxes on personal and real property. If the airlines were taxed at the same 5.885% rate as the other public utilities on both personal and *real* property, each airline would have paid between $688,000 and $1,472,000 more in PSC Taxes for each tax year in question.

[51]Since the airlines have the burden of proving the unconstitutionality of the PSC Tax to the extent measured by gross receipts from the air transport of persons, any ambiguity pertaining to the interpretation of either Section 1513 or HRS Section 239-6 should be resolved in favor of the State of Hawaii. *Norton Co. v. Department of Revenue*, 340 U. S. 534 (1951).

VI. Response To The Arguments Of The Airlines, The Solicitor General, And The ATA.

In stating the interest of the United States, the Solicitor General contends that "in our view, the Hawaii tax is a *flagrant violation* of federal law, and if it is sustained the prohibition contained in Section 1513 (a) will be *rendered ineffective*" (Br. for the United States at 1-2; emphasis added) because Congress enacted ADAP, including Section 1513, "to prevent *excessive taxation of airlines.*" (*Id.;* emphasis added). The United States then argues that the Hawaii Supreme Court "ignoring the plain terms of the congressional enactment . . . relied upon what it erroneously viewed as the underlying purpose of the federal statute" (*id.* at 6) to arrive at its decision which "threatens the fiscal integrity of . . . ADAP" (*id.*). The United States then suggests that "the decision below warrants summary reversal." (*Id.*)

In support of these statements, the United States relies upon Congressional interest in promoting aviation and air commerce, including the imposition of user taxes to support ADAP (*id.* at 6-7, 11-12). The United States further relies upon post *Evansville* Congressional concern with the proliferation of local head taxes that would duplicate the federal user taxes and impose an inequitable and potentially chaotic burden of taxation on users of air transportation. (*Id.* at 8-9). To establish that "[t]he problem posed" by the decision below "is neither isolated nor hypothetical" (*id.* at 10) the Br. for the United States refers not only to litigation involving general business taxes of New York, Arizona, and Alaska, but also to tax statutes of Delaware, Indiana, Maryland, Washington, and West Virginia, which allegedly "tax annual gross receipts or gross income without expressly exempting airline gross receipts." (*Id.* at 11, 11 n.15).

The Solicitor General's zeal to support the belated position of the Airlines has encouraged a flagrant misstatement of the interest of the United States and the purposes and policies of Congress in enacting ADAP, including Section 1513. First, Section 1513(a) will not be "rendered ineffective" if the PSC Tax is upheld by this Court. The legislative history reveals that Section 1513(a) was expressly enacted for the purpose of preventing the states from directly or indirectly imposing taxes similar to the three user taxes preempted by Congress. The PSC Tax does not conflict with this purpose. Second, the position of the United States that Congress enacted Section 1513(a) to prevent excessive taxation of airlines is based upon the erroneous assumption that the PSC Tax is "excessive" and that Section 1513 addresses this issue. If Congress had intended to relieve airlines from excessive property or general business taxes, it would not have enacted subsection (b). This subsection permits the states to impose general business taxes or property taxes on airlines, including the PSC Tax, irrespective of its rate or measure. The Solicitor General agrees, so long as these taxes are not measured by gross receipts from air transportation. Section 1513 (a) thus cannot be construed to protect airlines from excessive taxation, which is not germane to the subject matter of Section 1513. Third, that Congressional interest in promoting airport development and safety does not evidence an intent, policy, or purpose to exempt airlines from general business or property taxes that have been traditionally imposed by the states to defray general government costs.

Following the reasoning of the United States, the states should be prohibited from imposing nondiscrimina-

tory general business taxes on the trucking industry because of the Congressional interest in promoting and financing the interstate highway system. In short, nothing in the Br. for the United States, the legislative history or express language of Section 1513, supports the policy arguments of the Solicitor General. Congressional interest in air commerce and airport development does not manifest intent to exempt airlines from any general state business or property taxes.

After raising the basic policy issues discussed above, the Br. for the United States at 12-16 addresses the language of Section 1513. The Solicitor General first argues that Section 1513 is not ambiguous because Section 1513(b) is limited solely to *"taxes other than those enumerated in subsection (a)."* Id. at 13 (emphasis added). The Solicitor General then alleges that property taxes that are expressly excepted from subsection (a) by subsection (b) are prohibited by subsection (a) to the extent measured by gross receipts from air transportation. This argument is defective on its face. At best, this argument indicates that Section 1513 is ambiguous and its legislative history should be seriously considered by this Court. Indeed, the United States relies upon legislative history to support its argument.

After referring to testimony before the House Subcommittee's Hearing regarding Ohio's Discriminatory Tax —not a general business tax—imposed on gross receipts from air transportation of persons, the Solicitor General explains: "Thus, Congress considered a state taxing scheme similar to Hawaii's and deliberately chose not to modify the prohibitions against it." *Id.* at 14 (footnote

omitted). To paraphrase the Solicitor General's reasoning:

> Because a few members of the House Subcommittee heard some testimony concerning Ohio's discriminatory tax, which is specifically imposed only on airlines, this evidences Congressional intent to invalidate any general business or property taxes imposed upon airlines by any state, to the extent these taxes are measured by gross receipts from air transportation, even though they are specifically excepted from the prohibitions in Section 1513(a).

The Solicitor General fails to recognize that: (1) the subcommittee did not distinguish Ohio's specific excise tax on the transportation of persons by air, measured in reference to the enplaning and deplaning of passengers, from a head tax; (2) the Ohio tax was properly represented to the subcommittee as the only one of its kind in the nation;[52] (3) the Ohio tax singled out air transportation for discriminatory taxation; (4) nothing in the legislative history substantiates that Section 1513 was specifically designed to address the Ohio tax, unlike the Arizona tax considered by this Court in *Arizona Public Services Co. v. Snead,* 441 U.S. 141 (1979); and (5) the ATA, generally testified for the nation's scheduled airlines in reference to the Ohio tax, expressly stated that the airlines had no objection to paying their share of any general business taxes that did not discriminate against airlines.[53] *See* 1973 House Hearings, *supra* note 3. The Solicitor General, the Airlines, and the ATA have thus improperly

---

[52]*See supra* p. 14.

[53]The Solicitor General notes that the House Subcommittee was perhaps persuaded by the objections of the ATA to the Ohio tax. Br. for the United States at 14. However, the ATA testimony only indicated that the airlines had no objection to general business taxes imposed on airlines, but did strenuously

(Continued on next page)

relied upon testimony about Ohio's discriminatory tax to draw erroneous conclusions regarding Congressional intent.

In order to bring the tax in question within the prohibition of Section 1513(a) the Solicitor General's Brief ends with the argument that, under Section 1513(a), no difference exists between: (1) a tax imposed directly on the sales of air transportation or receipts derived therefrom; and (2) a property tax measured by gross receipts. Contrary to this argument, a substantial constitutional difference separates a tax imposed on a prohibited subject and a tax whose measure includes a prohibitive subject. *See supra* pp. 37-40; Br. for the Multi-state Tax Commission at 21-25. Furthermore, there is a significant difference between singling out airlines for discriminatory tax treatment and exempting airlines from general business or property taxes to the extent measured by gross receipts.

The arguments of the airlines and the ATA generally parallel those of the Solicitor General, except for referenc-

---

(Continued from previous page)

object to specific excise taxes that were imposed on airlines that were not imposed on any other businesses. Thus, the ATA's testimony in itself supports Hawaii's conclusion that Congress never intended to invalidate any general business taxes that were imposed on airlines, together with other classes of business, as part of an overall general business taxing program. Statements by unofficial groups promoting legislation have been utilized as interpretative aids only when the group sponsored and led the legislation through the legislature. *See* 2A *Sutherland Statutory Construction* 213 (C. Sands 4th ed. 1973) citing *Maneja v. Walalua Agr. Co.*, 349 U. S. 254 (1955); *United States v. Henning*, 344 U. S. 66 (1952); *Roland Electrical Co. v. Walling*, 326 U. S. 657 (1946).

es in the airlines' argument regarding the 1982 amendment of 49 U. S. C. 1513. See *supra* pp. 43-44 for our response to this argument. They require no additional comment here except that the State of Hawaii agrees with the statement in the ATA's brief that subsection (b) was enacted "to clarify that State taxes which did not duplicate the Federal tax were not prohibited." Br. for the ATA at 9.

CONCLUSION

For the reasons stated in this brief, and the *amicus* briefs submitted in support of the position of the State of Hawaii, it is respectfully submitted that this Court should affirm the judgment of the Supreme Court of Hawaii.

Respectfully submitted,

KEVIN T. WAKAYAMA
(Counsel of Record)

WILLIAM D. DEXTER

Attorneys for Appellee,
Director of Taxation,
Hawaii Department of Revenue

345 Queen St., No. 800
Honolulu, HI 96813
(808) 531-6277